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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~955~~ 110

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

C. E. NIEHOFF & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT OF RESPONDENT, C. E. NIEHOFF & CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 935.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

C. E. NIEHOFF & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT OF RESPONDENT, C. E. NIEHOFF & CO.

Respondent opposes the granting of the writ of certiorari sought by the Federal Trade Commission in this proceeding.

STATEMENT.

On May 17, 1955 the Federal Trade Commission, pursuant to its complaint charging that the volume discount purchase plan offered by respondent C. E. Niehoff & Co. to its various purchasers violated Section 2(a) of the Clayton Act, entered its final order directing that respondent "forthwith cease and desist" from using such pricing methods.

Respondent thereupon petitioned the United States Court of Appeals for the Seventh Circuit for a review of such order pursuant to Section 11 of the Clayton Act.

The court of appeals found that respondent's volume discount purchase plan violated Section 2(a) of the Clayton Act and affirmed the cease and desist portion of the Commission's order. However, in view of the uncontradicted evidence in the record showing that C. E. Niehoff & Co. would be put out of business if it were required forthwith to cease and desist from using the volume discount pricing methods traditional in the ignition parts field while its 19 competitors in that field were unfettered by a similar injunction, the court of appeals, in the exercise of its original equitable jurisdiction in such matters, struck from the Commission's order the word "forthwith" and inserted in lieu thereof the following:

> "* * * this cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." (Appendix A to Petn. p. 22.)

STATUTE INVOLVED.

The pertinent portions of Section 2 of the Clayton Act here involved (38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13) are set forth at pages 2 and 3 of the petition of the Federal Trade Commission.

At pages 3 and 4 of its petition the Federal Trade Commission sets forth only a part of the applicable portions of Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 21. Herewith follows all of the pertinent language of Section 11:

> That authority to enforce compliance with sections

2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations * * * in the manner and within the time fixed by said order. * * *

* * * * *

If such person fails or neglects to obey such order * * * the Commission or Board may apply to the United States Court of Appeals * * * for the enforcement of its order * * *. Upon such filing of the application and transcript the court * * * shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. * * *

* * * * *

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written

petition praying that the order of the Commission o
Board be set aside. * * * Upon the filing of the tra
script the court shall have the same jurisdiction t
affirm, set aside, or modify the order of the Commis
sion or Board as in the case of an application by th
Commission or Board for the enforcement of it
order, * * *.

* * * * * * *

The jurisdiction of the United States court of ap
peals to enforce, set aside, or modify orders of th
Commission or Board shall be exclusive.

ARGUMENT.

Section 11 of the Clayton Act confers upon the United States court of appeals, in matters coming before it on petitions to enforce as well as upon petitions to review cease and desist orders of the Federal Trade Commission issued pursuant to Section 2 of the Act, the power to enter a decree "affirming, modifying, or setting aside" any such order. After making this specific grant of power Section 11 then provides:

> The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Thus, Section 11 of the Clayton Act clearly confers upon the United States court of appeals original jurisdiction to enforce, set aside or modify an order of the Federal Trade Commission under Section 2 of the Act and, in pursuance of such original jurisdiction, the court of appeals may enter orders protecting the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do in an injunction suit. *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. 2d 182, 184 (C. A. 2); *Natural Gas Pipeline Co. et al. v. Federal Power Commission*, 128 F. 2d 481, 484 (C. A. 7).

The court below, in summarizing its jurisdiction pursuant to Section 11, correctly stated in its opinion (Appendix A to Petn. p. 19):

> Section 11 of the Clayton Act gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of

original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.

The evidence in the record establishes that the principal portion of respondent's business is the manufacture and sale of replacement parts in the automotive ignition field, in which field respondent has only nineteen competitors, all of whom use the volume discount purchase plan traditional in that field (R. 156-158, 189, 265-272, 305; Res. Ex. 3, R. 191).

Of these competing companies only three, other than respondent, have complaints or orders to cease and desist pending against them respecting the use of such pricing methods. Thus respondent's remaining competitors are presently free to continue such pricing practices without restraint, and the evidence clearly shows that respondent will be forced out of business if it is enjoined from using those pricing methods while its competitors are not under similar restraint (R. 156-158, 189, 208-209, 265-272, 305, 457-459; Res. Ex. 3, R. 191; Res. Exs. 17A-C, 24A-D, R. 594).

The court below found the foregoing evidence to be uncontradicted (Appendix A to Petn. p. 18).

Notwithstanding this competitive picture the Federal Trade Commission chose not to follow its customary practice of proceeding simultaneously against all competitors in the field (see *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 308, 309), but rather to initiate complaints against only a limited few.

Confronted with this manifestly unjust situation, the court below, in the exercise of its original equitable jurisdiction under Section 11 of the Clayton Act, correctly de-

cided to postpone the effective date of the Commission's order rather than to have it become effective forthwith and thereby force respondent out of business.

At page 7 of its petition the Commission cites *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, as a purported example of an "analogous situation" where this court refused to sanction as a defense to an administrative order the fact that like orders had not been issued against competitors. That case is not analogous. There the Interstate Commerce Commission ordered the Wabash Railroad to cease its practice of spotting freight cars without cost at the plant of A. E. Staley Manufacturing Co., one of its shippers. Staley asked that the order be set aside, since its enforcement would place Staley at a competitive disadvantage unless similar orders were issued against railroads serving its competitors. This court, after pointing out that under the Interstate Commerce Act, Staley, as a shipper, had the right to initiate proceedings with the Commission (under Section 13(1) of the Act) to compel the railroad serving Staley's competitors to stop the preferential practices, concluded that in view of this method available to Staley of "inducing the Commission to perform its duty," the order should not be set aside.

Here there exists no such statutory method whereby respondent Niehoff can induce the Federal Trade Commission to "perform its duty" respecting respondent's competitors.

At pages 6 and 7 of its petition the Federal Trade Commission states that the decision of the Seventh Circuit in the instant case is in conflict with the decision of the Eighth Circuit in *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, respecting which this court on March 25, 1957, in Cause No. 750, this Term, granted the petition for certiorari limited to Question 4 presented by the petition.

No such conflict exists. Not only is the opinion of the Court of Appeals for the Eighth Circuit in the *Moog* case silent as to the issue decided by the Seventh Circuit in the instant case respecting which the Federal Trade Commission here petitions for certiorari, but the Eighth Circuit could not even have considered the question since there was no evidence in the record before it showing that Moog would be put out of business if the Commission's order there under review became effective forthwith.

Nor is there any conflict between the decision of the Court of Appeals in the instant case and its decision in the case of *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, pending on petition for a writ of certiorari (No. 900, this Term), for there is similarly no evidence in the record in that case showing that Edelmann would be put out of business if the Commission's order against it became effective forthwith. Edelmann's offer of proof that it would be damaged if the order became effective forthwith is far short of either an offer of proof or evidence that it would be put out of business in that event.

Notwithstanding implications to the contrary, while Moog Industries and E. Edelmann & Co. each manufacture and sell automotive replacement parts, neither sells ignition parts and neither is one of the nineteen competitors of respondent Niehoff in the ignition field.

Though it is doubtful that the Federal Trade Commission is correct in its contention at page 8 that it has the initial power to determine what relief is appropriate where a violation of either the Clayton Act or the Federal Trade Commission Act is deemed to exist (see *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613, 614), the decision below in no way impinges upon this claimed power, and accordingly the cases cited at page 8 of the petition in support of this contention have no application.

Nor does the decision below in any way conflict with the decision in *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429 (C. A. 4), for there the court was reviewing an order of the Federal Trade Commission entered pursuant to the Federal Trade Commission Act on February 21, 1939, nearly a year following the adoption by Congress on March 21, 1938 of the amendment whereby Section 5(c) of that Act as originally enacted September 26, 1914 (38 Stat. 720) was changed so that the power of the United States court of appeals to review and enforce orders of the Commission entered pursuant to the Federal Trade Commission Act no longer paralleled the provisions of Section 11 of the Clayton Act which grants such court original jurisdiction to review and enforce orders entered pursuant to Section 2 of the latter Act.

CONCLUSION.

In modifying the order of the Federal Trade Commission in the instant case the court below was only exercising its original equitable jurisdiction pursuant to Section 11 of the Clayton Act. Its decision in that regard in no way conflicts with any other decision of the Court of Appeals for the Seventh Circuit or of any other United States court of appeals, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 21, 1957